IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-6431

ABDIEL CABAN,

Appellant,

—v.—

KAZIM MOHAMMED and MARIA MOHAMMED,

Appellees.

ON APPEAL FROM THE NEW YORK COURT OF APPEALS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

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INTEREST OF AMICUS*

Amicus, American Civil Liberties Union is a nationwide, non-partisan organization of 200,000 members. The Juvenile Rights Project is a special project within the ACLU that is dedicated to defending the rights of children and families. Central among those rights is the integrity of the child-parent relationship in a pluralistic society and the protection of that relationship against untoward state intrusion or control. The Juvenile Rights Pro-

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* Letters of consent to the filing of this brief are being lodged with the Clerk of the Court.

ject has participated in numerous cases that seek to insure family liberty and privacy.

STATEMENT OF THE CASE

In 1968 appellee, Maria Mohammed, and appellant, Abdiel Caban, began living together. (R.72,74). She was eighteen years old and he thirty-one. (R.73). Maria adopted Abdiel's surname and became known as Maria Caban. (R. 125-128). They had two children by this relationship and lived together until 1973, when Maria left appellant and took both children with her. (R.179). At the time of the separation the children were 4 and 2 years of age.

Both children's birth certificates list appellant as the father. His paternity of the second child was also acknowledged to the Board of Health. (R.74,78,85-6). Appellant did not, however, seek an order of filiation in the Family Court which would have legitimized his children.*

One month after the mother took the children and left appellant, she married Kazin Mohammed, hereafter referred to as the step-father. (R.90,94). For the first six months following the parents' separation, the children visited their father and slept at his apartment each weekend. (A.28;R.98,345-50).

After six months, the mother sent the children to live with their maternal grandmother in Puerto Rico. This occurred in September, 1974. (R.165,352). There they remained away from their parents for fourteen months. (R.183).

While the children were in Puerto Rico, the paternal grandfather, who also resides in Puerto Rico, visited them often and kept the father informed of their well-being. (R.244, 358). After fourteen months, in November, 1975, the father went to Puerto Rico and, not pleased with their development and life-style, took his children back with him to New York to live in his home with his present wife. (R. 360-367). The children lived with the father in New York for two months. During this time the children were well provided for and appellant contracted to purchase a larger home to accomodate all of them. (R.227-232, 371-374).

In January, 1976, the mother filed a petition for custody in the New York Family Court and obtained a temporary custody order that awarded visitation rights to the father, pending a trial on the merits. (R.270-271, 374-379). Before the custody trial took place, however, both the mother and step-father filed in the New York Surrogate's Court a petition to adopt both children. (A.3-7). The father and his present wife then cross-petitioned for adoption. (A.11-20).

After a hearing, the Surrogate's Court granted the step-father's petition for adoption, and denied the father's petition to adopt. The opinion of the Surrogate's Court is set forth in the Appendix. (A.27-30,31-36). In approving the adoption, the Surrogate's

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* See New York Fam. Ct. Act §517; New York Estates, Powers & Trust Law, §4-1.2.

Court specifically held:

> The prime objective of allowing a putative father to be heard is . . . not to determine the degree of his continued interest in the child but rather to determine the best interests of the child. Any evidence the putative father may offer concerning the solidity of the marriage and the concern and treatment of the child in the new family is particularly relevant. (A.28)

No finding of unfitness or abandonment by the father was made. As a result of the Surrogate's Court's order, all of the father's rights in and to his children, including visitation, were permanently severed.

On appeal the Appellate Division of the New York Supreme Court in a memorandum opinion unanimously affirmed. (A.41-44). An appeal to the New York Court of Appeals was dismissed because the "issues underlying this appeal . . . lack the degree of substantiality necessary to sustain this appeal as of right. . . " (A.45). Probable jurisdiction by this Court was noted on May 15, 1978. (A.51).

INTRODUCTION TO ARGUMENT

This case raises the questions left unresolved by Stanley v. Illinois, 405 U.S. 645 (1972) and Quilloin v. Walcott, __U.S.__, 54 L.Ed.2d 511 (1978): What are the constitutional rights of an unmarried father who has been a member of a de facto family unit with his illegitimate children? After the parents have separated, may a wholly fit and caring unmarried father be deprived of his parental rights altogether?

The resolution of this question is critical to a very large number of children and their fathers. Out-of-wedlock births have increased dramatically in recent years. In 1950, 3.9% of American births were to unmarried women. By 1970 that figure reached 10.7% and in 1975 the figure climbed to 14.2%. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES. 61 (1977). Like the appellant in this case, many of the fathers of these children have taken a deep and abiding interest in their care and custody. Unless the decision of the court below is reversed, however, the father-child relationship may automatically be severed whenever the mother forms a new attachment with a man whom a court believes would be a "better" father than the natural one. Amicus perceives the decision below as a dangerous precedent, insofar as it authorizes the permanent termination of parental rights of a wholly fit parent under the amorphous and ill-defined "best inter-

estsof the child" standard.*

ARGUMENT

POINT I
APPELLANT HAS A SUBSTANTIVE RIGHT TO REMAIN THE PARENT OF HIS CHILDREN.

This Court has long recognized that a compelling state interest is necessary to justify intrusion into a natural family and interference with the parents' right to raise their children.

> A host of cases, tracing their lineage to Meyer v. Nebraska, 262 U.S. 390, 399-401 (1923), and Pierce v. Society of Sisters, 262 U.S. 510, 534-535 (1925), have consistently acknowledged a "private realm of family life which the state cannot enter." Prince v. Massachusetts, 321 U.S. 158, 166 (1944).
> Moore v. City of East Cleveland, 431 U.S. 606, (1977).

See, also, Wisconsin v. Yoder, 406 U.S. 205 (1972).*

When parents voluntarily separate, the issue of custody typically arises for the first time. Because parents in this situation generally are no longer capable of cooperation and joint responsibility for their children, one parent necessarily must have custody and primary control over each child. The state must necessarily intrude upon the family for the limited purpose of determining which parent should have custody. As between the natural father and the natural mother in this situation, use of a "best interests of the child" test is appropriate. However, no compelling justification exists for then employing the "best interests" test to sever the child's relationship with the non-custodial parent altogether.

Although custody generally is regarded as the central aspect of parenthood, see Quilloin

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* Amicus perceives an alarming trend, despite strong dicta from this Court, towards terminating parental rights of non-neglecting and otherwise fit mothers and fathers because termination is perceived to be in the "best interests of the child." See, e.g., In re J.S.R., 374 A.2d 860 (D.C.App.1977); In re New England Home for Little Wanderers, 328 N.E.2d 854 (Mass. 1975); In re William L., 383 A.2d 1228 (Pa. 1978)(petition for cert. pending, sub. nom., Lehman v. Lycoming County Children's Services, 77-1704).

* Recent lower court opinions have applied this principle to state schemes which seek to terminate parental rights, e.g., Alsager v. District Court, 545 F.2d 1137 (8th Cir. 1976), or to remove children from their parents' custody in abuse or neglect proceedings, e.g., Roe v. Conn, 417 F.Supp. 769 (M.D. Ala. 1976) (3 judge court); Sims v. Texas Department of Public Welfare, 438 F.Supp.1179(E.D.Tex.1977).

v. Walcott, 54 L.Ed.2d at 520, other incidents of parenthood are of comparable constitutional importance. A long line of decisions establishes that it is the "relationship between parent and child" that "is constitutionally protected." 54 L.Ed.2d at 519, citing Wisconsin v. Yoder, supra; Stanley v. Illinois, supra; Meyer v. Nebraska, 262 U.S. 390 (1923). Biological ties and emotional attachments have been identified as important aspects of the constitutionally protected family relationship. Smith v. Organization of Foster Families for Equality and Reform, 431 U.S. 816, (1977). History and tradition have established that these ties, once established in a family setting, can and should be maintained after the breakup of the family. Thus, the non-custodial parent's right to remain in contact with his or her child and to regain custody should the custodial parent die, or become incapacitated or unfit, is an "intrinsic human right" which the Constitution safeguards. See Smith v. Organization of Foster Families for Equality and Reform, supra; quoting Moore v. City of East Cleveland, 431 U.S. at .

This Court has only recently reaffirmed that the State may not terminate parental rights "without some showing of unfitness and for the sole reason that to do so was in the children's best interest." Smith v. Organization of Foster Families for Equality and Reform, supra (Stewart, J., concurring); Quilloin v. Walcott, 54 L.Ed.2d at 520. As the Court in Stanley held, interference with parental rights is only justified by "powerful countervailing interests" on the part of the State. Stanley v. Illinois, 405 U.S. at 651.

Such an interest exists when the natural parent has mistreated or neglected his or her child. See 405 U.S. at 649. However, there is no issue in this case of neglect and abuse.

Certainly no powerful countervailing interest is present in this case. The adoption here accomplishes little more than granting the children the name of the stepfather, while cutting off all ties between appellant and his children. In today's society this fiction is unncessary. Many children live with fathers or mothers whose surname differs from their own.

As one New York Court recently observed in denying a stepfather adoption under the "best interests" standard:

> [I]t is hard to see what appreciable benefit would inure to the child should the adoption be approved. It can be presumed that the child is presently aware or will eventually become aware of the fact that he was born out of wedlock. The adoption will not erase that fact from his mind. Nor is an adoption required in order to give a home to a homeless boy . . . an adoption order cannot by itself constitute or add anything to the quality of this child's upbringing.
> In re Gerald G.G., __App. Div. 2d __, 4 FLR 2368 (2d Dept.,

March 20, 1978).

Moreover, there is no reasonable assurance that the mother's current marriage will create a permanent and stable environment for the children. In fact, as of 1975, one in three first marriages in the United States end in divorce. UNITED STATES BUREAU OF THE CENSUS, Number, Timing, and Duration of Marriages and Divorces in the U.S.; 4,6, June, 1975, Series P-20, No. 297. For persons who have been married once before, the projected divorce rate is about 40%. Id. at 6. Accordingly, the state's interest in effecting a permanent family for appellant's children is "de minimus." See Stanley v. Illinois, 405 U.S. at 657.

Amicus does not urge that all unmarried fathers have an absolute veto over the adoption of their children by the mother's spouse. Thus, unmarried fathers who have had no substantial contact or interest in their children may be viewed in a different light than appellant. Indeed this is the combined lesson of Stanley and Quilloin. Quilloin was "not a case in which the unwed father at any time had, or sought actual or legal custody of his child." In Stanley, by contrast, this Court held that the state could not deprive an illegitimate father of custody of his children upon the death of their mother without a showing of unfitness.

The critical distinction between Stanley and Quilloin is that in Stanley the father had had custody of the children for a number of years and thus the Court recognized his "cognizable and substantial interest" in their

"companionship, care, custody and management." 405 U.S. at 652, 651. Where such a cognizable interest has been established, parental rights cannot be denied merely upon application of the nebulous "best interests of the child standard. It is submitted by Amicus that this standard -- that the parent's interest in his or her child be "cognizable and substantial" -- should be applied in determining when constitutional protection of parental rights other than custody is triggered. Because appellant has had a "cognizable and substantial" interest in his children and because the states interest in their care and custody is "de minimus," appellant's parental rights should be restored by this Court.

POINT II
NEW YORK'S SCHEME AS APPLIED TO APPELLANT DEPRIVES HIM OF EQUAL PROTECTION OF THE LAW.

Even if New York's interest in promoting adoptions were, arguendo, found strong enough to overcome the natural parent's interest in the parental bond, the State cannot promote on the basis of sensitive classifications which this Court has subjected to heightened constitutional scrutiny. There are three separate classifications at issue in this case: unmarried fathers and unmarried mothers; married fathers and unmarried fathers; and legitimacy and illegitimacy.

A. Unmarried fathers and unmarried mothers.

The record shows that both the father and the mother have a substantial rela-

tionship with their children. Both the mother and father lived with the children for four years. Although the mother had custody of the children for the first seven months after the breakup of the de facto family -- during which time the father exercised weekend visitation -- the mother voluntarily separated from her children for the next fourteen months when she sent them to Puerto Rico. It was the father who brought the children back to New York and who had exclusive custody of them for the two months immediately preceding appellees' petition to adopt. Had the statutory scheme in New York allowed consideration of factors beyond gender, termination of petitioner's parental rights could not have been justified. His concern and responsibility for the welfare of the children have been clearly demonstrated.

Notwithstanding the basic parity between the mother and father in their relationship to their children, under New York law the father, but not the mother, is irrebuttably presumed to have no interest in the care, upbringing and welfare of his children.* This discrimination based solely on presumed gender-based characteristics is wholly in conflict with recent decisions of this Court. "To withstand

* In Quilloin v. Walcott, supra, the Court expressly avoided consideration of the gender-based equal protection claim in that case because it was not presented in appellant's Jurisdictional Statement. 54 L.Ed.2d at 518 n. 13. In this case, gender-based discrimination was raised in appellant's Jurisdictional Statement. J.S. at 6.

constitutional challenge, . . . classifications by gender must serve important governmental objectives and must be substantially related to the achievement of those objectives." Craig v. Boren, 429 U.S. 190, 197 (1976). Neither the lower court in this case nor the New York Court of Appeals in Matter of Malpica-Orsini, 36 N.Y.2d 568 (1975), identified any important governmental objectives that the sex classification of New York Domestic Relations Law §111 was designed to further.

Wholesale discrimination on the basis of gender is not necessary to achieve any of the goals identified by the New York Court of Appeals' authoritative interpretation of the provision. Matter of Malpica-Orsini, supra. The court in Orsini indicated that the legislature may have been concerned about the possibility of extortion and black market adoptions. See 36 N.Y.2d at 573. However, unmarried fathers as well as unmarried mothers may be tempted to "sell" their children on the open market. Requiring the consent of both parents gives the child double protection against this occurrence. Further, the interest of the State in preventing extortion would not be compromised by granting an interested parent the right to prevent adoption of his children. To the extent that New York Domestic Relations Law §111 embodies the assumption that granting such a right to fathers who are willing to take responsibility for their children would cause other fathers of illegitimate children to contest adoptions out of spite or greed, the statute is based on unproven generalizations. Even if it is assumed that a significant percentage of unmarried fathers are

likely to resort to blackmail or extortion, New York's scheme is overbroad. Such an overbroad generalization on the basis of sex has been condemned by this Court. See, e.g., Craig v. Boren, supra (the assumption that males are reckless cannot support sex-based distinctions in the sale of 3.2% beer); Stanley v. Illinois, supra (irrebuttable presumption that unwed fathers are unfit is unconstitutional). Moreover, in order to serve any of these goals, the sex distinction embodies "outdated misconceptions concerning the role of females in the home," or simply serves as "an inaccurate proxy for other more germane bases of classification." See Craig v. Boren, 429 U.S. at 198-99.

Other purposes of §111 were identified as "securing a normal home for children" and not discouraging marriage by making it impossible for stepfathers to adopt their stepchildren. 36 N.Y.2d at 573. Taken together, these two statements imply that the goal of the state is to place children in homes with two parents who are married to each other. If this is indeed the state's purpose, then the statute is still overbroad because, as the facts of this case demonstrate, unmarried fathers may also get married and thus be able to suppy a "normal" home for the children.

Finally, New York's policy of facilitating adoption of unwanted and homeless children, see 36 N.Y.2d at 572, would not be undermined by granting a parent who desires to take care of his children the right to prevent their adoption by a stranger. Delay in the adoption

process due to difficulty in locating the natural father, see 36 N.Y.2d at 572, could be avoided by limiting the veto to those fathers who have maintained contact with their children or who have otherwise asserted parental rights.* While sex is related to delay in the adoption process since the mother's identity can be more readily ascertained and verified than can the father's identity, sex classifications must be narrowly tailored to a permissible objective. See, Califano v. Goldfarb, 430 U.S. 199 (1977). In this case, appellant's identity as father of the children has been easily established and never questioned.

The sex-based generalizations inherent in §111 are also defective because the presumption created against unwed fathers is irrebuttable. Irrebuttable presumptions are viewed with great suspicion when they are coupled with a sensitive classification or a constitutionally protected interest. See Stanley v. Illinois, supra; Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974); Jimenez v. Weinberger, 417 U.S. 628 (1974). Cf., Weinberger v. Salfi, 422 U.S. 749, 771-72 (1975).

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* As of December, 1975, at least twenty-six states required consent to an adoption from unmarried fathers under certain conditions which appellant would have met in this case. At the same time, twenty-one states, including New York, did not require consent from unmarried fathers. Recent Developments -- Rights of the Unwed Father and Consent to Adoption After In re Malpica-Orsini, 61 CORNELL LAW REV 312, 312-313 (1975).

Since §111 gives fathers such as petitioner no opportunity to demonstrate that they do not fit the legislature's stereotype, it cannot withstand constitutional scrutiny.

B. Legitimacy

Wholesale discrimination between legitimates and illegitimates is likely to be the result of habit and prejudice rather than careful analysis. See, Matthews v. Lucas, 427 U.S. 495, 520 (Stevens, J., dissenting). Thus the Constitution demands that classifications based on illegitimacy be "carefully tuned to alternative considerations." Trimble v. Gordan, 430 U.S. 762, 772 (1977), citing Matthews v. Lucas, supra. In Matthews v. Lucas, supra, this Court upheld the provisions of the Social Security Act which, for purposes of determining eligibility for survivors' benefits, conclusively presumed the dependency of legitimate children, and of certain classes of illegitimate children, while requiring other illegitimate children to establish actual dependency. The Court stated:

> [T]he statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations. The presumption of dependency is withheld only in the absence of any significant indication of the likelihood of actual dependency.
> 427 U.S. at 513.

Where statutory schemes were not so finely tuned, however, as in this case, classifications based on illegitimacy have been held to violate the equal protection rights of de facto families. In Trimble v. Gordan, supra, this Court invalidated an Illinois statute which denied an illegitimate child the right to inherit intestate from her father. Although "the lurking problem with respect to proof of paternity," 430 U.S. 771, quoting Gomez v. Perez, 409 U.S. 535 (1973), might justify some different treatment of illegitimates, total disinheritance of all illegitimate children of intestate fathers was unnecessary.

In fact, this Court has regularly invalidated schemes, as the one in this case, which are based "solely and finally on the basis of illegitimacy, and regardless of any demonstration of dependency or other legitimate factors." Matthews v. Lucas, 427 U.S. at 511; New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Levy v. Louisiana, 319 U.S. 68 (1968). See also, Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968). Even where some attempt at tailoring the illegitimacy classifications is made, it will not withstand attack unless it is carefully enough tuned. The statutory scheme at issue in Jiminez v. Weinberger, 417 U.S. 621 (1974) denied disability benefits to certain illegitimate children born after the onset of their father's disability. The Court invalidated this classification because "the blanket and conclusive exclusion of appellants' subclass of illegitimates" was not reasonably

related to the state's goal of preventing fraudulent claims. 417 U.S. at 636. In Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972), the exclusion of unacknowledged illegitimate children from equal sharing with other of the insured's children in workmen's compensation benefits was found to deny equal protection to that subclass of illegitimates.

C. Married fathers and unmarried fathers

Glona v. American Guarantee and Liability Insurance Co., supra, establishes that the Constitution forbids irrational discrimination against unwed parents, as well as against their children. Although the situation in Glona differs from the Court's other decisions in that it did not involve punishment of innocent children for the sins of their parents, the Court could find no rational basis for the denial of an action for the wrongful death of her child to an unwed mother and thus held the statute unconstitutional.

In Quilloin the Court considered and rejected the father's argument that he was denied equal protection of the law because he was treated differently than "a married father who is separated or divorced from the mother and is no longer living with his child." 54 L.Ed.2d at 520. The Court had little difficulty recognizing a constitutional distinction between Quilloin and a married father since "a father whose marriage has broken apart will have borne full responsibility for the rearing of his children during the period of his marriage." Id.

Although the Court in Quilloin, considering the validity of a statute similar to §111, held that Georgia could reasonably distinguish between a divorced father and an unmarried father who had never demonstrated any interest in obtaining custody of his children, the holding was limited to sustaining the statute "as applied." Appellant in this case is functionally indistinguishable from a divorced father. There is no more need for a stepfather adoption of appellant's children than for adoption of the children of a non-custodial divorced father. Thus the State's discrimination against a known and concerned non-custodial father who has "shouldered . . . responsibility with respect to the daily supervision, education, protection, or care of the child," Quilloin v. Walcott, 54 L.Ed.2d at 520, simply because he never married the mother is arbitrary and irrational.

CONCLUSION

For the foregoing reasons, the judgment of the lower court should be reversed.*

Respectfully submitted,

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